

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs June 19, 2002

STATE OF TENNESSEE v. PATRICK O. CROWLEY

Appeal from the Criminal Court for Anderson County
No. 99CR352 James B. Scott, Judge

No. E2001-02557-CCA-R3-CD
July 23, 2002

The defendant, Patrick O. Crowley, was indicted for DUI and DUI per se, fourth offense, driving on a revoked license, second offense, felony evading arrest, and possession of marijuana. See Tenn. Code Ann. §§ 39-16-603, 39-17-418, 55-10-401, 55-50-504. Prior to trial, he pled guilty to second offense driving on revoked and possession of marijuana, Class A misdemeanors. A jury acquitted the defendant of DUI and evading arrest, but found him guilty of DUI per se. The trial court ordered concurrent sentences of 11 months, 29 days for driving on a revoked license and possession of marijuana, to be served consecutively to a two-year sentence for the DUI. In this appeal of right, the defendant claims that the evidence is insufficient to support his conviction for DUI per se. The judgment of the trial court is affirmed.

Tenn. R. App. P. 3; Judgment of the Trial Court Affirmed

GARY R. WADE, P.J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

Nancy C. Meyer, Assistant Public Defender, for the appellant, Patrick O. Crowley.

Paul G. Summers, Attorney General & Reporter; Kathy D. Aslinger, Assistant Attorney General; and Jan Hicks, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

At approximately 9:33 p.m. on May 16, 1999, Deputy Jodi Flynn of the Anderson County Sheriff's Department observed the defendant's vehicle traveling eastbound on Andersonville Highway in Anderson County. When the vehicle traveled back and forth within its lane and crossed the line dividing the two eastbound lanes three times over eight-tenths of a mile, Deputy Flynn turned on her cruiser's blue lights to initiate a traffic stop. The defendant's vehicle did not stop, however, and instead proceeded southbound onto Interstate 75. Deputy Flynn turned on her siren and called the dispatcher for assistance. Another officer in a marked sheriff's vehicle responded and

drove alongside her car and behind the defendant at speeds varying between 45 and 50 miles per hour. Three commercial vehicle enforcement officers in marked cars and a Tennessee Highway Patrol officer joined in the pursuit. As they entered Knox County, a waiting THP officer drove onto the interstate in front of the defendant and gradually slowed his vehicle to a stop, causing the defendant to stop as well.

Deputy Flynn, who calculated that the defendant traveled a total of nine miles on the interstate, stopped her cruiser behind the defendant's car, drew her weapon, and ordered the defendant to show his hands. After he did so, she approached the vehicle, opened the driver's door, and directed the defendant to step outside. The defendant failed to comply and, when the deputy attempted to pull him from the car, became "dead weight," looking straight ahead. Another officer helped remove the defendant from his vehicle and handcuff him. When Deputy Flynn performed a pat-down search of the defendant, she discovered a clear plastic baggie containing some marijuana and a hand-rolled marijuana cigarette in the left front pocket of his pants. Deputy Flynn noted that the defendant's eyes were bloodshot and that he had "a strong odor of an alcoholic beverage about his breath and person." Because the defendant had failed to respond to her blue lights and cooperate with her orders to step outside the vehicle, she considered him a flight risk and chose not to administer any field sobriety tests, which would have required the removal of his handcuffs. After another officer transported the defendant to the Anderson County Detention Facility, Deputy Flynn read him the implied consent law and explained the breath alcohol test. She testified that the defendant agreed to the test and that she observed him for the requisite 20 minutes before administering it. The Intoximeter EC/IR results showed that the defendant's breath alcohol content was .11%.

The defendant testified that just prior to being stopped, he had been checking on flower beds that he had built the day before in Clinton. He claimed that he had not consumed any alcohol and insisted that he was unaware of the activation of any emergency lights until he saw those on a vehicle approximately a mile in front of his car. The defendant explained that because he was driving cautiously toward the lights, "it was some time before [he] noticed the blue lights behind [him]." He stated that he first believed that the police vehicles behind him intended to drive around to the "emergency ahead;" after they stayed behind him for "some distance," he signaled and drove to the side of the interstate. The defendant asserted that Deputy Flynn instructed him to face forward with his hands up and that a male officer "immediately jerked" him from his car and pushed him to the pavement, where he was handcuffed. He contended that another deputy drove him to the jail and attempted to give him a breath alcohol test, but was unable to get a reading. The defendant claimed that Deputy Flynn then administered the test and indicated that she got a reading, but did not state what it was. He testified that he later heard an officer in the booking area ask whether he was "legally drunk" and another officer respond that his breath alcohol content "wasn't but point four." The defendant contended that he had just purchased the marijuana for \$5 and claimed that the seller was an unknown man at a BP station.

In this appeal, the defendant argues that the indictment for DUI per se, which referenced only blood alcohol content, was inadequate to support a conviction for a breath alcohol content of .10 or

greater. He also asserts that because the state failed to explain any correlation between breath alcohol content and blood alcohol content, the evidence was insufficient. The state maintains that both the content of the indictment and the evidence offered at trial were sufficient.

The statute defining driving under the influence provides, in pertinent part, as follows:

It is unlawful for any person to drive or to be in physical control of any automobile or other motor driven vehicle on any of the public roads and highways of the state, or on any streets or alleys, or while on the premises of any shopping center, trailer park or any apartment house complex, or any other premises which is generally frequented by the public at large, while:

(1) Under the influence of any intoxicant, marijuana, narcotic drug, or drug producing stimulating effects on the central nervous system; or

(2) The alcohol concentration in such person's blood or breath is ten-hundredths of one percent (.10%) or more.

Tenn. Code Ann. § 55-10-401(a). Subsection (a)(1) establishes the offense of DUI; subsection (a)(2) defines DUI per se.

Here, count one of the indictment charged the defendant with DUI under subsection (a)(1) of the statute. That count provided that on May 16, 1999, the defendant

did . . . unlawfully, intentionally and knowingly operate and was in physical control of, a motor vehicle on the public roads and highways of Anderson County, Tennessee, while under the influence of an intoxicant in violation of TENN. CODE ANN. 55-10-401

Count two of the indictment charged the defendant with DUI per se under subsection (a)(2) of the statute and recited that he

did . . . unlawfully, intentionally and knowingly operate and was in physical control of, a motor vehicle on the public roads and highways of Anderson County, Tennessee, at a time when the alcohol concentration of his blood was ten-hundredths of one percent (.10%) or more, in violation of TENN. CODE ANN. 55-10-401

The jury acquitted the defendant on the first count of the indictment but convicted him of DUI per se under the second count. Essentially, the defendant now claims that there was a variance between the DUI per se indictment and the proof at trial. Provisions of both the federal and Tennessee constitutions guarantee the criminally accused knowledge of the "nature and cause of the accusation." U.S. Const. amend. VI; see also Tenn. Const. art. I, § 9. In order to comply with these constitutional guidelines, an indictment or presentment must provide notice of the offense charged, adequate grounds upon which a proper judgment may be entered, and suitable protection against

double jeopardy. Tenn. Code Ann. § 40-13-202; State v. Byrd, 820 S.W.2d 739 (Tenn. 1991); State v. Pearce, 7 Tenn. 66, 67 (1823). A variance between an indictment and the evidence presented at trial is not fatal unless it is both material and prejudicial, State v. Moss, 662 S.W.2d 590 (Tenn. 1984), thus affecting the substantial rights of the accused, State v. Mayes, 854 S.W.2d 638, 639-40 (Tenn. 1993) (citing Berger v. United States, 295 U.S. 78, 82 (1935)). When the indictment and the proof substantially correspond, the defendant is not misled or surprised at trial, and there is protection against a second prosecution for the same offense, the variance is not considered to be material. Moss, 662 S.W.2d at 592.

In our view, the variance between the DUI per se indictment and the proof in this case is not fatal. The indictment charged the defendant with two counts of DUI occurring on May 16, 1999. The two counts represented alternative theories – DUI and DUI per se. Even though the DUI per se count referred to blood alcohol content, the record demonstrates that the defendant was fully aware that he had submitted to a breath test, not a blood test. Thus, the defendant had adequate notice of the offense charged and could not have been misled or surprised at trial. While imprecise, there was substantial compliance between the indictment and the proof. Most importantly, the indictment is sufficient to protect the defendant from a second prosecution for the same offense.

Further, the evidence was sufficient to support the defendant's conviction for DUI per se, the alternative chosen by the jury. Deputy Jodi Flynn testified that the defendant had bloodshot eyes, smelled of alcohol, and exhibited other signs of intoxication. At the Anderson County Detention Facility, the deputy explained the breath alcohol test to the defendant and then observed him for the next 20 minutes, with no unusual events occurring. When the defendant blew into the Intoximeter EC/IR, the test results, which are included in the record, indicated a breath alcohol content of .11%. The statute, as indicated, makes it unlawful for a driver's "blood or breath" alcohol content to be .10% or more. The Intoximeter EC/IR was properly certified and Deputy Flynn was trained and certified to operate it.

Accordingly, the judgment of the trial court is affirmed.

GARY R. WADE, PRESIDING JUDGE